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In the Supreme Court of the United States

OCTOBER TERM, 1977

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER
v.
CHARLESTONE STONE PRODUCTS CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–17a) is reported at 553 F. 2d 1209. The opinion of the district court (Pet. App. C, pp. 19a–27a) is not reported. The decision of the Interior Board of Land Appeals (Pet. App. D, pp. 28a–58a) is reported at 9 IBLA 94.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 18a) was entered on May 12, 1977. On August 1, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and includ-

ing September 9, 1977, and the petition was filed on that date. The petition was granted on November 28, 1977 (A. 32A). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether water is a locatable mineral under the mining law of 1872.

STATUTES INVOLVED

Section 9 of the Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51, provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *.

Section 17 of the Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52, provides:

> All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title.

Section 1 of the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22, provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the

> United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

STATEMENT

Since 1866 the federal mining laws have permitted citizens to seek, discover, and extract valuable minerals on the public domain and to secure fee title to lands containing such discoveries. Act of July 26, 1866, 14 Stat. 251; see *Cameron* v. *United States*, 252 U.S. 450, 460. Under the mining law of 1872 (Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*), which remains the basic law governing mineral claims, the claimant must establish that he has discovered a valuable mineral deposit within the limits of each claim. *Cole* v. *Ralph*, 252 U.S. 286, 295. The test for value is the "prudent man test," *Chrisman* v. *Miller*, 197 U.S. 313, 322, augmented by the marketability test, *United States* v. *Coleman*, 390 U.S. 599, 602–603. The combined tests require evidence of a mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that the minerals from the claim could be

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marketed at a profit. In 1955 Congress withdrew "common variety" minerals such as sand and gravel from location under the mining laws. Act of July 23, 1955, Section 3, 69 Stat. 368, as amended, 30 U.S.C. 611. Consequently a claimant to a deposit of such minerals must show that there was a valuable discovery prior to the 1955 withdrawal date, *Cameron* v. *United States*, 252 U.S. 450, 462, as well as at the time of the administrative hearing. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336.

The Secretary of the Interior initiated this proceeding in 1965, contending that each of 25 sand and gravel placer mining claims [1] near Las Vegas, Nevada, held by respondent Charlestone Stone Products Co., Inc.,[2] was invalid for want of a discovery of a valuable mineral prior to July 23, 1955, the date common variety minerals became no longer locatable.[3]

The claims in question, which were originally located in 1942 by A. M. Murphy and Fred Pine,[4] lie

[1] A placer mining claim is a claim for a mineral deposit that is not in the form of a vein or lode. Placer claims are permitted on the public lands pursuant to 30 U.S.C. 35.

[2] The claims were the Charlestone, Charlestone Nos. 1–22, and Nos. 12A and 13A (Pet. App. D, p. 33a). The courts below apparently overlooked the Charlestone, as they refer to only 24 claims. (Although the name on the claims is actually "Charleston," and both the claims and respondent were so denominated in the administrative record (see Pet. App. D, p. 33a), in the courts below respondent has used the name "Charlestone," and those courts have applied this spelling to the claims as well as to respondent. We do the same to minimize confusion.) A map of the Claims is reproduced at A. 23A–24A.

[3] Act of July 23, 1955, Section 3, 69 Stat. 368, as amended, 30 U.S.C. 611.

[4] Claims 12A and 13A were not located until 1961 (Pet. App. D. p. 33a). See note 7, *infra*.

in a narrow wash on public land fifteen miles northwest of Las Vegas (Pet. App. D, p. 33a). They cover 490 acres of land and encompass a massive deposit of sand and gravel containing at least twenty million cubic yards of material (*ibid.*). Prior to 1955 material was removed from the claims during two periods. From 1942 to 1943 Southern Nevada Industries, Inc., extracted between 75 and 100 thousand cubic yards of material for use in the making of concrete blocks and the wartime construction of runways at nearby Nellis Air Force Base (Pet. App. D, pp. 34a–35a). In 1954 E. H. Brawner leased the claims, agreeing to pay Murphy and Pine ten cents per cubic yard for all material removed, and guaranteeing two hundred dollars per month. By 1956 Brawner had produced approximately fifteen thousand yards of material, operating from a pit located on Claims 9 and 10 (Pet. App. D, p. 35a). Brawner's operation was located farther from Las Vegas than any other operating deposit in the area and it was the only operation that had no water available to wash the material (A. 21A; Pet. App. D, p. 36a). In 1959 Brawner's lease was cancelled as a result of nonpayment of royalties (Pet. App. D, p. 36a).

Respondent acquired the claims on January 4, 1960, and in 1962 discovered water on Claim 22 (Pet. App. A, p. 5a; Pet. App. D, p. 45a; Pet. App. C, p. 23a). In 1964 respondent leased Claims 1–16 to Arden Sand & Gravel Company for a minimum royalty of twelve thousand dollars per year (Pet. App. D, p. 45a; Pet. App. C, p. 23a).

In the administrative contest initiated by the Secretary, the issue was whether respondent could prove that a valuable and marketable discovery had been made on the claims prior to July 23, 1955 (and existed at the time of the hearing).

The government presented one witness, Donald Fisher, a mining engineer. Fisher had examined the claim sites in 1965 and 1969, had reviewed the relevant mineral reports, and had interviewed both past and present sand and gravel dealers in the area (Pet. App. A, p. 7a; Pet. App. D, pp. 41a–42a). Fisher's testimony indicated that when he examined the claims in 1965, no sand and gravel had ever been removed from 15 of the 25 claims, namely, the Charlestone and Nos. 1, 2, 3, 5, 8, 11, 12, 12A, 13, 13A, 15, 19, 20, and 22 (See Pet. App. D, pp. 42a, 53a). He estimated that the removals from the other claims had been as follows (Pet. App. D, p. 42a):

Claim No.:	Amount (in cubic yards)
4	1,370
6	100
7	55
9	4,485
10	84,400
14	37,700
16	15,615
17	24,485
18	350
21	2,830

Fisher testified that the excessive haul distance to the market and the lack of washing facilities would

have prevented profitable operation of the claims prior to 1955, and he therefore concluded that all of the claims were invalid for want of a discovery of a valuable mineral prior to July 23, 1955 (A. 21A–22A; Pet. App. D, pp. 42a–43a). The government also introduced a Bureau of Land Management report prepared in 1961 which stated that Brawner, who had leased the claims in 1954, had ceased operations in 1958 because of the excessive haul distance (Pet. App. D, p. 43a).

Respondent presented a number of witnesses who had observed or taken part in removals of material from certain of the claims.[5] Respondent also introduced a marketability study of the Las Vegas Valley sand and gravel industry prepared in 1956 by two Bureau of Land Management employees (Hill and Lovejoy) (Pet. App. D, p. 35a), and the deposition of one of the authors of that report, Starr Hill, Jr. Hill stated that in his opinion at the time of the

[5] These witnesses included Rae Allen Wheeler, a trucker, who testified that he had removed 3,000–4,000 tons per month from mid–1954 to 1958 from certain of the claims; Vernon Frehner, a contractor and trucker, who testified that he had hauled approximately 5,000 cubic yards from 1954 to 1957, or 1956 to 1957; and H. Guy Jacka, who testified that he had purchased several thousand tons of rock chips annually from 1954 to 1958 (Pet. App. D, pp. 43a–45a). Respondent also introduced the deposition of Harrison S. Stocks, who testified that he had used material from the area of the claims for more than 30 years and that he had removed fairly large quantities from six of the claims; he also stated, however, that between 1948 and 1964 he had had little interest in the claims. Other witnesses testified to later removals (*id.* at 44a–46a). See *id.* at 53a–55a for the discussion by the Interior Board of Land Appeals (IBLA) of the weight it accorded this evidence.

report, the Charlestone claims were valid (Pet. App. D, p. 57a).[6]

On this evidence the administrative law judge found that the sand and gravel on the claims were common variety minerals, and that respondent had established the discovery of a valuable mineral by the critical date only with respect to Claim 10 (see Pet. App. D, p. 32a). The Interior Board of Land Appeals (IBLA) affirmed (Pet. App. D, p. 58a).[7]

The United States District Court for the District of Nevada vacated and set aside the administrative decision (Pet. App. C, pp. 19a–27a). The court held (1) that the testimony of the Secretary's only witness, the mining engineer Fisher, should not

[6] The IBLA concluded that Hill's general statement was insufficient to validate all of the claims (Pet. App. D, p. 57a). It found that Hill's opinion was premised on the theory, espoused by respondent, that proof of marketability on one claim would validate all the claims on that deposit (*ibid.*). The IBLA rejected that contention, noting that it would permit a person to locate an entire desert and establish its marketability by selling sand from one claim (*id.* at 40a).

[7] The administrative law judge also held Claim 9 valid as a reasonable reserve for Claim 10, but the IBLA reversed because there was no independent evidence of marketability regarding Claim 9 (Pet. App. D, pp. 52a–53a).

The administrative law judge found that Claims 12A and 13a, which were located after the effective date of the Act of July 23, 1955, were void *ab initio* (Pet. App. D, pp. 33a, 49a). These findings were affirmed by the IBLA and by the district court (Pet. App. D, p. 49a; Pet. App. C, p. 25a). Respondent acknowledged in the court of appeals that the materials on its claims were common varieties and that Claims 12A and 13A were therefore invalid (Pet. App. A, p. 2a n. 1).

have been credited by the administrative tribunals on the issue of marketability, since he was not personally conversant in 1955 with the local market for sand and gravel from the claims (*id.* at 20a–21a); and (2) that the successful drilling of a water well on Claim 22 in 1962 and the leasing of Claims 1–16 in 1964 at a minimum annual royalty of $12,000 were substantial evidence that material could have been extracted from these claims at a profit prior to July 23, 1955 (*id.* at 24a). Accordingly, the court decided that "at least" Claims 1–16 were valid, and that respondent must be permitted access to the water it had discovered on Claim 22 so that the water could be "made available to the operations on the valid claims" (*id.* at 26a).

The court of appeals affirmed (Pet. App. A, pp. 1a–17a), with one significant addition: It held that Claim 22 was also valid, because the water respondent had discovered on that claim was, the court concluded, a locatable mineral. The parties had neither briefed nor argued this question. The court stated: "We are satisfied that Charlestone * * * had the right to appropriate and utilize as a mineral the water within any of the claims which met the above two prong test of value and success in development" (*id.* at 15a). It noted that "[s]ince early times, water has been regarded as a mineral," and observed that the federal mining statutes which allow the location of placer

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claims "do not expressly define water as a nonmineral" (*id.* at 15a–16a). Because "the successful recovery of many 'hard' minerals from the earth and the utilization of the soft mineral of water therewith go hand in hand," the court declined to assume "that Congress was not aware of the necessary glove of water for the hand of mining * * * [or that] Congress impliedly intended to reserve water from those minerals allowed to be located and recovered" (*id.* at 16a). The court pointed out that water was not named as one of the common varieties of minerals that were withdrawn from location as of July 23, 1955, so "it is of no importance that the discovery of water within Claim 22 occurred after" that date (*id.* at 16a–17a).

The water on Claim 22 "undeniably has an intrinsic value in the desert area," the court continued, although there was "no evidence of a profitable market of the water per se for either domestic or irrigation uses" (*id.* at 17a). Since the water could be used to wash the sand and gravel from respondent's other claims, and since there was a profitable market for washed sand and gravel, the court held that "Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid" (*id.* at 17a).

SUMMARY OF ARGUMENT

1. The general mining laws, since their inception in 1866, have provided separately for the right to mine valuable minerals and for the acquisition of water rights. Congress recognized from the outset the critical role of water in mining operations. But instead of establishing a statutory system to govern the acquisition of private water rights on public lands, Congress chose to sanction rights recognized under the state and local laws that had been developed in the arid regions to allocate water among competing uses, including mining.

The general mining laws enacted in 1866 and 1870 contained separate provisions regarding water rights. These provisions were left unchanged by the 1872 mining law (30 U.S.C. 22 *et. seq.*), which remains the basic law governing mineral claims, and they are now codified in 30 U.S.C. 51 and 52. Section 51 provides that rights that are acquired "by priority of possession" to the use of water on the public lands, and that are "recognized and acknowledged by the local customs, laws and decisions of the courts," are to be "maintained and protected." Section 52 provides that "[a]ll patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights * * * acquired under or recognized by section 51 * * *."

Congress thus has expressly provided in the mining laws that the acquisition of private water rights on public lands is to be governed by state and local law, and not by the mining laws themselves. In a line of cases beginning soon after adoption of the mining laws, this Court recognized that these statutory provisions "confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-

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land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain." *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155. This legislative choice was not surprising, since the water law of the Western States had been developed in large part to meet the needs of miners.

These specific provisions for the acquisition of water rights under state and local law preclude any inference that Congress intended the federal law of mining claims to govern the acquisition of water rights. The court of appeals, however, was apparently unaware of these provisions. It relied on the general proposition that water is a mineral, and the observation that the mining laws do not expressly exclude water from the definition of the term "mineral." The court's interpretation of the mining laws to permit the location and patent of mining claims to water disregards the distinction Congress drew between water rights and mineral claims, and leaves Sections 51 and 52 as mere surplusage.

Giving the term "mineral" its broadest definition in the context of the mining laws—a definition that includes common stone, dirt, and earth—makes nonsense not only of the mining laws, but of many other public-land laws as well. Under this interpretation all public lands would have been "mineral" lands open to entry under the mining laws, and there would have been no need for agricultural entry laws, such as the homestead and desert entry acts.

2. Even if the statutory scheme of the mining laws were not clear on its face, the administrative decisions of the Department of the Interior have consistently held that water is not a locatable mineral, and that acquisition of water rights on public lands is not governed by the federal mining laws. These decisions of the officers charged with the administration of the public land laws are entitled to great deference, and should be well-nigh conclusive where, as here, the interpretation has prevailed for more than a century and has served as the basis for a system of settled property rights.

In reliance on the clear mandate of the statutes and on the decisions of both the Department of the Interior and this Court, many thousands of persons seeking water rights on public lands have followed the procedures prescribed by state and local law. Affirmance of the decision below would cast doubt on rights long thought to be established, and would unsettle the water law of the Western States.

Moreover, permitting the location and patent of mineral claims to a substance as common and widespread as water would invite abuse of the mining laws by persons seeking to acquire public lands for non-mining purposes. In the view of the Department of the Interior, permitting the location of mineral claims for water would threaten a repetition of the abuses that occurred in the past in connection with other common minerals, such as sand and gravel, and that caused Congress to remove them from location under the mining laws.

ARGUMENT

I. THE MINING LAW OF 1872 SHOULD NOT BE CONSTRUED TO PERMIT THE LOCATION OF WATER AS A MINERAL BECAUSE THE MINING LAWS THEMSELVES, AND OTHER PUBLIC LAND LAWS, PROVIDE THAT STATE AND LOCAL LAW GOVERNS THE ACQUISITION OF WATER RIGHTS

A. THE GENERAL MINING LAWS HAVE ALWAYS PROVIDED THAT THE ACQUISITION OF WATER RIGHTS IS GOVERNED BY STATE AND LOCAL LAW, NOT BY THE FEDERAL MINING LAWS

The federal mining laws since their inception have provided separately for the right to mine valuable minerals and for the acquisition of water rights. This duality precludes any inference that Congress intended water to be locatable as a mineral under these laws. Congress recognized the critical role of water in mining operations. But instead of establishing a statutory system to govern the acquisition of water rights on the public lands, Congress chose to ratify the rights recognized under the state and local laws that had been developed in the arid regions to allocate water among competing uses, including mining. To construe the provisions of the federal mining laws governing the location and patent of mineral claims as applicable to water would defeat Congress's intent to allow state and local law to govern the acquisition of water rights, and would make the provisions of the federal mining laws that deal with water rights mere surplusage.

In 1866, in the first general mining law,[8] Congress tablished the pattern of treating water rights sepa-

[8] Prior to 1866 Congress had passed a number of limited measures permitting the lease, and in a few cases the sale, of specified

rately from mining rights. The Act of July 26, 1866, 14 Stat. 251, opened the mineral lands of the public domain for exploration and occupancy and permitted the location and patent of lode or vein claims on certain conditions.[9] With regard to water rights, however, the Act declared that rights that had been acquired "by priority of possession" to the use of water on public lands, and that were "recognized and acknowledged by the local customs, laws, and the decisions of the courts," were to be "maintained and protected." Section 9 of the Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51.[10] When placer claims were made subject to location and patent in 1870, Congress followed the pattern of distinguishing between the mining rights governed by the federal statutes and water rights. Section 17 of the Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52, provided that "[a]ll patents granted, or homesteads allowed, shall be subject to any vested and accrued

tracts of mineral lands, particularly for lead and copper mining. See Gates, *History of Public Land Law Development* 703–716 (1968); Hibbard, *A History of the Public Land Policies* 512–517 (1939).

[9] The claimant had to observe certain posting and filing requirements and expend at least $1,000 in labor and improvements.

[10] No printed committee report was prepared in connection with the Act, and the debates did not focus on Section 9 or its relation to other provisions of the Act. See Cong. Globe, 39th Cong., 1st See Gates, *History of Public Land Law Development* 703–716 4054 (1866). The history of these provisions is discussed in Gates, *supra*, note 8, at 716–719.

water rights" acquired or recognized under the 1866 law.[11]

When Congress enacted the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*, which is still the basic law governing mineral claims, it superseded portions of the earlier acts, but it left unchanged the water rights provisions enacted by Section 9 of the 1866 Act and by Section 17 of the 1870 Act. See Sections 9, 10, and 12 of the 1872 Act, 1 Stat. 94–95.[12] Those provisions are now codified as 30 U.S.C. 51 and 52.

In a line of cases beginning soon after the adoption of these mining statutes, this Court has consistently read these statutes as expressing Congress's intention to allow state and local laws to govern the acquisition of water rights on the public domain, for purposes including but not limited to mining. In *Basey* v. *Gallagher,* 20 Wall. 670, 683–684, decided in 1874, the Court observed that the mining law of 1866 was intended "to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition," and which was evidenced by

[11] Section 17 was introduced as a floor amendment, which its sponsor proposed in order to ensure that the 1870 legislation would not affect the rights secured under the 1866 legislation. It was adopted with virtually no discussion. Cong. Globe, 41st Cong., 2d Sess. 2030 1870). No committee report is available.

[12] The debates contain no discussion of water rights. See Cong. Globe, 42d Cong., 2d Sess. 532–535, 2456–2462, 2897–2899 (1872). No committee report is available.

"local customs, or by the legislation of the State or Territory, or the decisions of the courts." See also *Atchison* v. *Peterson,* 20 Wall. 507; *Jennison* v. *Kirk,* 98 U.S. 453; *Broder* v. *Water Company,* 101 U.S. 274. The Court returned to these provisions of the 1866 and 1870 laws in *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 155, where it held:

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

It is not surprising that when Congress enacted the general mining laws it chose to sanction the rights acquired under state and local law, for the water law of the western mining states had evolved in large part to meet the needs of the miners who settled those areas. The development of the doctrine of prior appropriation has been described in McGowen, *The Development of Political Institutions on the Public Domain,* 11 Wyo. L.J. 1, 14 (1956), as follows:

> [T]he mining districts are of current significance not only because of the law of mining but also because of the law of water which owes its origin to them. A good many of the mines in California were placer mines. Water is essential to the operation of a placer mine. But a

great many of these placer mines were situated a considerable distance from the stream and frequently entirely beyond the drainage of the stream. Just as there were not enough mines for all the people, there was not enough water for all the mines. Now the Anglo-American doctrine of riparian water rights was established on the premise that water belonged to the owner of the land adjacent to the stream and that while each land owner had a right to use the water still he was obligated to return it to the stream undiminished in quality and quantity for his neighboring riparian owner immediately below him on the stream. Such a law was of course worked out to meet the economic needs of a group of eastern factory owners and mill operators. It was a law made in a damp moist country, and simply did not fit the needs of the western miners. Hence, they were again thrown upon their own resources to work out a system wherein the greatest amount of good could be obtained from the limited amount of water.

The miners met this problem just as they met the problem of adjusting the right to use a limited number of mines among a multitude of people. They applied the doctrine of prior appropriation to the water just as they did to the mining claims, and they limited the amount of water each person could use to the amount that he originally appropriated from the stream to operate his mine. The size of the ditch was used to determine the quantity of water originally taken. They also decreed that a failure to use the water for a given time worked an abandonment of the right to take the water just as a failure to work the mine worked an abandonment of the mine.

It was soon discovered by those who went to farm that the water law as worked out by the miners was much more appropriate to their needs in such a[n] arid country than the riparian rights which their ancestors had worked out in the humid East. Hence, the law of water, as originally worked out in the mining districts of California was soon to become the water law of the entire arid west.[13]

In enacting the mining laws Congress chose to give federal approval to rights recognized under this system of state and local law—which was uniquely suited to the needs of the mining community—rather than to establish a federal law of water rights. See *Jennison* v. *Kirk, supra,* 98 U.S. at 456–461; *Basey* v. *Gallagher, supra,* 20 Wall. at 681–684.[14]

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[13] The appropriative doctrine does not, however, govern every aspect of water law in the Western States. It has been recognized in 17 Western States, but certain of these States continue to recognize the riparian doctrine, or at least the existence of some riparian rights, as well. See Hutchins, *Selected Problems in the Law of Water Rights in the West* 30–34 (1942). Additionally, state law in many cases distinguishes between ground and surface waters, and between various types of ground waters (underground streams, percolating waters, artesian wells). See *id.* at 146–151. Congress sanctioned rights acquired under state and local law, but it did not require the States to adopt any particular water law doctrines. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163–164.

[14] This construction of the mining laws is universally accepted by the authorities on water law. One leading treatise, 2 Clark,

B. OTHER PUBLIC LAND LAWS FOLLOW THE PATTERN OF THE MINING LAWS

Other public land laws followed the pattern established in the general mining laws, recognizing that state law governs the acquisition of private water rights on public lands.[15] These enactments include the

Waters and Water Rights 53 (1967), analyzes the provisions at issue as follows: "The mining laws of the United States and the laws covering waters date from the same period in United States history. But under the mining laws the United States established procedures for acquiring rights from the United States; the passive policy reflected in the laws pertaining to water rights resulted in water rights being acquired through territorial and state law procedures. In other words, Congress enacted specific national mining laws which could be supplemented by local law not inconsistent with United States law. With respect to water, Congress merely established a policy of recognizing rights acquired through local procedures."

See generally Hutchins, *Selected Problems in the Law of Water Rights in the West* 64–74 (1942), I Wiel, *Water Rights in the Western States*, §§ 94–108 (3d ed. 1911). A study prepared for the National Water Commission reaches a similar conclusion. See Trelease, *Federal-State Relations in Water Law* 74–76 (1971). Mining law treatises likewise recognize that water rights are obtained under state law. *E.g.*, 3 Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands*, § 838 (1914); Ricketts, *American Mining Law*, §§ 80, 81, 84 (1943 ed.); Morrison, *Mining Rights on the Public Domain* 229–231 (1936).

[15] In addition, many Acts dealing with federal programs and projects include provisions disclaiming any intent to affect or interfere with state laws relating to the control, appropriation, use, or distribution of water, or with vested rights acquired under those laws. Provisions of this nature are found in the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383; the Federal Power Act, 41 Stat. 1077, 16 U.S.C. 821; the Submerged Lands Act, 67 Stat. 30, 43 U.S.C. 1311(e); and the legislation authorizing the Boulder Canyon Project, 45 Stat. 1062, 54 Stat. 779, 43 U.S.C. 617g, 618m. See generally Trelease, *Federal-State Relations in Water Law* 76–80 (1971).

Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321; the National Forest Act of 1897, 30 Stat. 36, 16 U.S.C. 481;[16] and the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b.[17]

Perhaps the most pertinent is the Desert Land Act, which made the desert lands in a number of Western States available for purchase by persons who would irrigate them, and provided that a claimant's right to the use of water for irrigation "shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation" (Section 1, 43 U.S.C. 321). Section 1 of the Act also provides that—

> all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for ir-

[16] The National Forest Act provides (30 Stat. 36, 16 U.S.C. 481): "All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations thereunder."

[17] The Taylor Grazing Act provides, in pertinent part (48 Stat. 1270, as amended, 43 U.S.C. 315b): "* * * *Provided further*, That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law."

rigation, mining, and manufacturing purposes subject to existing rights.

This Court considered these provisions in *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra,* 295 U.S. at 162, and concluded:

> The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. [Emphasis in original.]

This construction of the Desert Land Act was recently reaffirmed and followed in *Cappaert* v. *United States,* 426 U.S. 128, 143–145, where the Court noted that "the

water rights of those who received their land from federal patents are to be governed by state law."

C. IT WOULD DEFEAT THE CONGRESSIONAL INTENT EXPRESSED BY THESE STATUTES IF THE MINING LAW OF 1872 WERE CONSTRUED TO PERMIT THE LOCATION OF WATER AS A MINERAL

It is true, as the court of appeals noted (Pet. App. A, p. 16a), that Congress nowhere expressly provided that the term "mineral" in the mining law of 1872 should not be construed to include water. But Congress made its intention clear by providing in that statute for the acquisition of water rights under state law (by reaffirming Section 9 of the 1866 Act and Section 17 of the 1870 Act, now codified as 30 U.S.C. 51 and 52).[18] The court of appeals did not discuss these water-rights provisions, and indeed it appears to have grounded its analysis on the false assumption that the mining laws made no specific provision for water rights. From this incorrect premise the court reasoned that it should construe the mineral location provisions to apply to water, since it would be "incongruous for us to hazard that Congress was not aware of the necessary glove of water for the hand of mining" and had not provided for the acquisition of water rights (Pet. App. A, p. 16a). The decision below thus rests on apparent ignorance of the special provision Congress made for the acquisition of water rights under state law.

Contrary to the court of appeals' belief that it was advancing the purpose of the mining laws, its inter-

[18] See page 16, *supra.*

pretation of the mineral-claims provisions as applicable to water renders the provisions dealing specifically with the acquisition of water rights superfluous. Its decision thus offends "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott, and Dunning*, 412 U.S. 609; 633; *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, 420 U.S. 395, 402–403. Substituting mining claims for the law of prior appropriation as the means of acquiring water rights would defeat Congress's intent to sanction the state and local law of prior appropriation that had evolved in response to the special needs of the arid western mining region.

To allow the acquisition of water rights through mining claims would produce results quite different from those reached under the doctrine of prior appropriation. It is a distinguishing feature of this doctrine—and a critical principle in an arid region—that the right is recognized only as long as, and only to the extent that, the water is put to beneficial use.[19] Since a mining claim need not be exploited to be valid, *Melluzzo* v. *Morton*, 534 F. 2d 860, 863 (C.A. 9), a mining claim to water presumably would not be lost if no beneficial use was made. Before a claim is taken to patent, the claimant need only perform $100 worth

[19] Appropriative rights are forfeited under state law by failure to use the water for a prescribed period. See Hutchins, *Selected Problems in the Law of Water Rights in the West* 392–397 (1942). They may also be lost by adverse use by another for a prescriptive period, or by intentional abandonment (*id.* at 389–392, 397–402).

of labor or make $100 worth of improvements each year to maintain his claim. 30 U.S.C. 28. If a claimant to water had met this requirement (by installing a $100 pump, for example), he presumably could prevent others from making use of the water within the boundaries of his claim, even if he did not use the water himself.

In the case of a source of water wholly within a single claim, the claimant presumably could prevent the use of this water altogether.[20] In the case of a stream flowing over his claim, it might be possible for a claimant to dam the stream and collect all the water, again without regard to his ability to make beneficial use of it.[21] Once the claim had been patented, the owner would have fee title and would not be required

[20] Although the water on Claim 22 in this case was ground water (reached by a well), the reasoning of the court of appeals would appear to apply to water generally, including surface water. This is, however, one of the questions raised and left open by the decision below.

The Executive Order of April 17, 1926, issued pursuant to Section 10 of the Stock-Raising Homestead Act of 1916, 39 Stat. 865, 43 U.S.C. 300, withdrew public lands containing springs and water holes from location under the mining laws. See 43 C.F.R. 2311.

[21] It is not clear how a federal mining right to water could be quantified or limited in amount. The mining laws permit a claimant who has located, marked, and recorded his claim to have exclusive possession and to extract an unlimited quantity of valuable minerals from a limited physical area. *Union Oil Co.* v. *Smith*, 249 U.S. 337, 348–349. The limit is 20 acres for a placer claim, 30 U.S.C. 35, and 1,500 feet along a lode claim, plus 300 feet on either side of the vein, 30 U.S.C. 23. In contrast, water rights are generally usufructuary rights, *i.e.*, rights to the use or the flow of water. Wiel, *Water Rights in the Western States* (Vol. I), §§ 15–18, Vol. II) §§ 1100–1101 (3d ed. 1911). Appropriative rights are

to expend the minimum $100 per year in order to maintain the exclusive right to "mine" the water (or to let it go unused).[22] Application of the principles of mining law, in place of those of prior appropriation, thus seems ill-calculated to assure the beneficial use of scarce water resources.

Justification for overturning the clear and long-settled legislative scheme is not provided by the perception of the court of appeals that "[s]ince early times, water has been regarded as a mineral" (Pet. App. A, p. 15a). As this Court recognized in *Northern Pacific Railway* v. *Soderberg,* 188 U.S. 526, 530:

rights to use a certain quantity of water—usually measured in cubic feet per second, or in miners' inches in the case of diversions for irrigation, or acre feet in the case of diversions for storage—during a given period of time; one may have the right to divert a given quantity continuously through the entire year, or only during a portion of the year, or at intervals. Hutchins, *Selected Problems in the Law of Water Rights in the West* 298–299 (1942). If one party has the right to appropriate vaters from a stream only on certain days of the week, those waters are subject to appropriation by others on the remaining days of the week (*ibid.*)

[22] See 30 U.S.C. 29 (lode claims) and 37 (placer claims) for the requirements for obtaining a patent.

The court of appeals did not discuss whether water was to be located as a lode or placer claim. Although this case involves a placer claim, an argument can be made that water would fall more logically within the definition of a lode claim (see *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673; *Fuller* v. *Mountain Sculpture*, 6 Utah 2d 385, 314 P. 2d 842), with a stream or groundwater basin constituting the "mineral vein" or "lode" (see 30 U.S.C. 26). In the case of a lode claim, the claimant normally has the right to follow the vein or lode, below ground level, beyond the surface limits of his claim. 30 U.S.C. 26. Thus it might be possible by a single lode claim to gain ownership of all the ground water in a basin (except in the case of land withdrawn from location under the Executive Order of April 17, 1926, see note 20, *supra*).

> The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it.

Giving the term "mineral" its broadest meaning in the context of the mining laws would be equally absurd. At the time of the enactment of the general mining laws, the General Land Office classified all public lands as either mineral or agricultural; mineral lands could be entered only under the mining laws, and agricultural lands only under the agricultural entry laws, including the Homestead and Desert Land Acts. Also at that time, Congress was making grants of nonmineral lands to the States and the railroads. See *Robert L. Beery*, 25 IBLA 287, appeal pending *sub nom. Steele* v. *Kleppe*, N.D. Cal., Civ. No. C–76–I840–WHO (Pet. App. E, pp. 59a, 66a). If all the substances within the broadcast definition of the word "mineral"—including common dirt and stone—were locatable under the mining laws, there could have been no entry under the agricultural entry laws and no grants to the States or railroads, since "all land would then have been 'mineral land.'" *Ibid.* Generalizations about the meaning of the term "mineral" in other contexts thus provide no basis for disregarding the intent that Congress has expressed in adopting the

mining laws and maintaining them for more than a century.[23]

II. CONSTRUING THE MINING LAW OF 1872 TO PERMIT LOCATION OF WATER AS A MINERAL IS ALSO CONTRARY TO THE ESTABLISHED CONSTRUCTION OF THAT ACT BY THE DEPARTMENT OF THE INTERIOR

The interpretation and application of the mining laws is the province of the Department of the Interior, which acts "as a special tribunal" to administer the laws "regulating the acquisition of rights in the public lands"; it is also the responsibility of the Secretary of the Interior, who is "charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved * * *." *Cameron* v. *United States,* 252 U.S. 450, 460; *Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334, 337. The administrative decisions of the Department of the Interior on the issue presented here were ignored by the court of appeals. Those decisions have consistently held that water is not a locatable mineral, and that the acquisition of water rights is not governed by the federal mining laws.

In early decisions nearly contemporaneous with the adoption of the mining laws, the Secretary squarely rejected the contention that water could be located as a mineral. In *William A. Chessman,* 2 L.D. 774, 775, decided in 1883, the Secretary noted that "the patent is not in fact sought for a placer claim but for a water right," and held that "as such right cannot be patented under a mining claim the application should be rejected." See also *Pagosa Springs,* 1 L.D. 562. Three years later the Secretary observed in *Charles Lennig,* 5 L.D. 190, 191, that water rights "are acquired by priority of appropriation and are governed by local customs and laws," and in that manner "are amply protected" by the 1866 and 1870 mining acts.

In 1976, after thorough consideration of the relevant provisions of the mining laws and the Desert

[23] The court of appeals relied (Pet. App. A, p. 16a) on *United States* v. *Union Oil Co.*, 549 F. 2d 1271 (C.A. 9), certiorari denied *sub nom. Ottoboni* v. *United States*, No. 76-1796, October 31, 1977, response to petition for rehearing requested, January 9, 1978, for the proposition that "water itself may be classified as a mineral." *Union Oil* holds that the reservation to the United States of "all the coal and other minerals" under Section 9 of the Stock-Raising Homestead Act of 1916, 39 Stat. 864, 43 U.S.C. 299, received geothermal resources. It provides no support for the court's construction of the mining laws here. *Union Oil* did not hold that water was a mineral, although the court did observe that each element of a geothermal system—including magma, porous rock strata, and water—might be classified as a mineral for some purposes. 549 F. 2d at 1273–1274. The court there emphasized, as we do here, that the legislative purpose controls, and that interpretation of the term "mineral" in a given statute is "basically a question of legislative intent." 549 F. 2d at 1273 n. 5. The court determined that in passing the Stock-Raising Homestead Act Congress intended to provide homesteaders with lands on which they could support their families by raising livestock, but to reserve unrelated subsurface resources, particularly energy resources, for separate disposition. The court concluded that because geothermal resources "are depletable subsurface reservoirs of energy, akin to deposits of coal and oil," They were included in this reservation. *Id.* at 1279. The court distinguished between "fresh water for the use of livestock" and "underground sources of energy for use in generating electricity." *Ibid.*

There would be, of course, nothing new about the conclusion that the meaning of a word varies in different statutory contexts. See, *e.g., Towne* v. *Eisner*, 245 U.S. 418, 425 (Holmes, J.).

Land Act, the Interior Board of Land Appeals reaffirmed this conclusion. In *Robert L. Beery,* 25 IBLA 287, appeal pending *sub nom. Steele* v. *Kleppe,* N.D. Cal., Civ. No. C–76–I840–WHO (Pet. App. E, pp. 59a–73a), the Board held (Pet. App. E, p. 70a):

> Because the usufructuary right to water was to be disposed of in accordance with *state* law, it could not at the same time be disposed of under the general mining law. Moreover, because two of the three statutory provisions severing the water from the land were enacted as *part* of the general mining law, it seems fairly clear that Congress had no intention of disposing of water under other provisions of the mining law. [Emphasis in original.]

The Board also noted that, in view of the consistent administrative precedent, it could not consider water a locatable mineral, in the absence of some compelling reason to do so, "[i]f we are to pay more than lip service to the doctrine of stare decisis * * *" (Pet. App. E, p. 63a).

Thus, even if the statutory scheme were not clear on its face, the "great deference" due to the statutory interpretations adopted by the officers charged with administering the land laws, *Udall* v. *Tallman,* 380 U.S. 1, 16; cf. *Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334, 337; *Cameron* v. *United States, supra,* 252 U.S. at 460, should preclude judicial interpretation of the statute at this date to find water to be a locatable mineral. This deference is especially appropriate where the administrative practice at stake " 'involves a contemporaneous construction of a statute by the men charged with the responsibility of

setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Udall* v. *Tallman, supra,* 380 U.S. at 16, quoting *Power Reactor Co.* v. *Electricians,* 367 U.S. 396, 408. It is well-nigh conclusive where the interpretation in question has prevailed for more than a century and has grounded a system of settled property rights.

III. PERMITTING THE LOCATION OF WATER AS A MINERAL WOULD THROW ESTABLISHED RIGHTS INTO QUESTION AND INVITE ABUSE OF THE MINING LAWS

More than 100 years after enactment of the general mining laws, the ruling below stands alone in holding that water is a locatable mineral. In reliance on the clear mandate of the relevant statutes and the decisions of both the Department of the Interior and this Court, many thousands of persons seeking water rights on public lands have followed the procedures prescribed by state and local law.[24] Affirmance of the decision below would cast doubt on rights long thought to be established under state and local law and would unsettle the law of water rights in the Western States.

The court of appeals' opinion—which does not acknowledge the existence of 30 U.S.C. 51 and 52—

[24] Indeed, although the record is silent on this point, we are informed by the Attorney General of Nevada that in 1964 respondent filed an application for a state permit to appropriate the water on Claim 22, and that a permit was granted on August 18, 1964, authorizing respondent to appropriate .5556 cubic feet of water per second.

gives no hint whether location of a mineral claim for water would be an additional method of acquiring water rights, or whether it might be deemed the exclusive method. Assuming it would only be an additional or alternative method, harmonizing the water rights acquired under the mining laws with those acquired under state law would be no simple task. Novel issues would arise, such as the priority of rights acquired under the different systems, that could be expected to generate extensive litigation.[25] If location under the mining laws were now deemed the exclusive method for acquiring water rights (despite 30 U.S.C. 51 and 52), private rights long considered established under state law would presumably be invalidated.

Permitting the location and patent of mining claims for water would also invite abuse of the mining laws by persons seeking to obtain land for purposes other than mining. Under Section 203 of the Federal Land Policy and Management Act of 1976, Pub. L. 94–579, 90 Stat. 2750, a person who purchases public land for a residential subdivision must pay its fair market value. Under the law now applicable to the disposal of common variety minerals and timber on the public lands, the purchaser must pay "adequate compensa-

[25] For example, since mining claims are permitted in the national forests (see 16 U.S.C. 482 *et seq.*), conflicts might arise between mining claims located for water on forest lands and rights impliedly reserved by the United States, at the time of the reservation of those lands, to sufficient water "to accomplish the purpose of the reservation." See *Cappaert* v. *United States*, 426 U.S. 128, 138.

tion" as established by competitive bidding. 30 U.S.C. 601, 602. Under the mining laws, in contrast, if a valuable mineral is present and the claimant has spent at least $500 improving his claim, he can obtain fee title to a 20-acre placer claim for $2.50 per acre (30 U.S.C. 37) and fee title to a lode claim for $5.00 per acre (30 U.S.C. 29). Because of the relative ease with which mining claims may be located and perfected, the ability to locate and patent claims to "minerals" of widespread occurrence has previously led to misuse of the mining laws by persons seeking land for other purposes. It was misuse of sand and gravel claims that led Congress in 1955 to remove sand, gravel, and other specified materials of widespread occurrence from location under the mining laws (Act of July 23, 1955, 69 Stat. 368–372, as amended, 30 U.S.C. 611–615). See H.R. Rep. No. 84–730, 84th Cong., 1st Sess. 5–6 (1955).[26]

The Department of the Interior has concluded that because of the widespread occurrence of water, to allow the location of mining claims to this "mineral"

[26] Section 4 of that Act, 69 Stat. 368, as amended, 30 U.S.C. 612, reaffirmed the congressional understanding that water is not a mineral under the mining laws. Section 4 provides that nothing in the Act "shall be construed as affecting or intended to affect or in any way interfere with or modify the laws * * * [of the Western States] relating to ownership, control, approrpriation, use, and distribution of ground or surface waters within any unpatented mining claim."

The conference report states that this language was an amendment "[a]greed to by the House managers, * * * [which] makes clear an intent to leave unaffected the operation of State water laws in the reclamation West governing the ownership, control, appropriation, use, and distribution of ground or surface waters." H.R. Conf. Rep. No. 84–1096. 84th Cong., 1st Sess. 3 (1955).

would "invit[e] a repeat of the abuses attending the locatability of sand and gravel * * *." *Robert L. Beery, supra* (Pet. App. E, p. 68a). The potential for abuse in the case of water is formidable. Although no precise figures are available regarding the amount of public land open for location on which water might be discovered, it is estimated that approximately 309.9 million acres are now available for location under the mining laws,[27] and that one-third of the area of the coterminous United States overlies groundwater from which a well could produce at least 50 gallons of water per minute.[28] Although we do not know whether the one-third fraction applicable to the country as a whole is also applicable to the locatable portion, it is clear that mining claims based on water as a locatable mineral could permit the private acquisition of millions of acres of federal land, without the commensu-

[27] A 1976 study by the Secretary of the Interior reported that in the States subject to the mining law of 1872, public domain lands and lands in which a mineral estate had been reserved to the United States totaled 734 million acres, or approximately 33 percent of the total land area of the United States. Annual Report of the Secretary of the Interior under the Mining and Minerals Policy Act of 1970, *Mining and Minerals Policy* 83 (1976). Of this total, 233.6 million acres are currently subject to slight or no restrictions on mineral exploration and development under the mining law, and another 76.3 million acres are available for such development subject to moderate restrictions. *Id.* at 84–87 and Table 6–1. The remaining 424 million acres include lands on which mineral exploration and development have been formally prohibited by an Act of Congress, Executive Order, or some other dictate, and lands where mineral development is severely restricted. *Id.* at 85.

[28] Corker, *Groundwater Law, Management, and Administration* 4 (1971).

rate public gain that presumably results from the exploitation of substances traditionally classed as minerals. The potential for abuse is especially troubling in view of the court of appeals' reliance on the intrinsic value of water in a desert community to establish marketability (Pet. App. A, p. 17a), an analysis that seems to justify any mining claim to water throughout the arid West. The widespread existence of water under public lands might prompt claimants to attempt the blanket location of much of the West (in a manner such as that described in *United States* v. *Zweifel,* 508 F. 2d 1150 (C.A. 10)), with the knowledge that the United States would have difficulty challenging these claims in order to clear the lands for legitimate mineral exploitation.

Indeed, since mining claims need not specify the mineral discovered, allowing the location of claims for water might permit the validation of otherwise invalid claims originally premised on the discovery of some other mineral. For instance, prior to the court of appeals' decision respondent had claimed Claim 22 in this case was located for sand and gravel, not water. The Department of the Interior believes that such metamorphoses of mining claims could become common in areas such as the Las Vegas Valley, where many sand and gravel claims that the Department has contested overlie potential groundwater supplies. Thus, permitting the location of claims for water might not only encourage new attempts to misuse the mining laws, but might also validate claims of the very sort that caused Congress to withdraw sand

and gravel from location in order to stop a demonstrated pattern of abuse of those laws.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it holds Claim 22 valid.

Respectfully submitted.

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